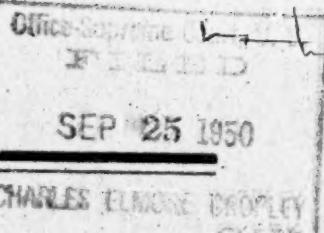


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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, AT THE RELATION OF
DR. N. H. DYER, ET AL., ETC., Petitioners,

v.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST
VIRGINIA, Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Appeals of the
State of West Virginia.*

**BRIEF OF THE INTERSTATE COMMISSION ON THE POTOMAC
RIVER BASIN AS AMICUS CURIAE IN SUPPORT OF PETI-
TION FOR CERTIORARI**

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Commission on the Potomac River Basin.*

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**MEMORANDUM OF THE INTERSTATE COMMISSION
ON THE POTOMAC RIVER BASIN AS AMICUS
CURIAE IN SUPPORT OF THE PETITION**

This brief is filed on behalf of the Interstate Commission on the Potomac River Basin composed of three members from each of the signatory states, i. e., Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. The United States is represented by three voting members appointed by The President.

**INTEREST OF THE INTERSTATE COMMISSION
ON THE POTOMAC RIVER BASIN**

The interest of the Interstate Commission on the Potomac River Basin in this litigation is both direct and general.

It is direct for the reason that respondent Sims has concluded that the decision of the court below constitutes a mandate requiring him to refuse to honor a requisition on him for the payment of West Virginia's share in the expenses of the Potomac Commission. Refusal by respondent Sims to pay funds duly appropriated by the Legislature of West Virginia for the use of the Potomac Commission has thus jeopardized the full and proper functioning of the Potomac Commission.

In a broader sense, the members of the Potomac Commission are convinced that the philosophy of cooperative, voluntary state activity by the compact method directed toward the abatement of pollution in the stream basins of the nation is a vital conservation measure. It is sanctioned by the Constitution of the United States, authorized and approved by the Federal Congress, and specifically approved by the legislatures of the member states both in the Ohio Basin and in the Potomac Basin. If the decision below is allowed to stand, the entire structure of interstate agreements will be placed in jeopardy.

STATEMENT OF THE CASE

The petition for a writ of certiorari, which has been filed in this case by the State of West Virginia, contains a full statement of the facts involved and the proceedings in the court below. The petition, the brief of the States of Ohio, Indiana, Illinois, Kentucky, Pennsylvania, and New York as amici curiae, in support of the petition for writ of certiorari, and the memorandum for the United States as amicus curiae in support of the petition, contain a full and detailed statement of the public interest in compacts of the nature of the one herein in question, which statements apply equally to the Potomac Basin compact. No useful purpose could be served in repeating or restating the facts and able arguments therein presented. It is desired, however, to adopt the facts and endorse the arguments therein set forth.

and, with as little repetition as possible, to supplement them with a few points, set out below, which we believe may be of assistance to this Court.

DISCUSSION

Introduction

The great public interest in and practical necessity for interstate compacts such as the one here in question, having already been fully covered in the briefs above referred to and conceded even by the respondent, the Court's attention is invited to the following facts and circumstances.

Respondent Sims, in his brief, seeks to establish that there is involved only the simple issue of the interpretation of a state statute by the highest court of that State. If this were all that is involved, there would clearly be no question for this Court to entertain.

However, the patent fact is that there is involved in the instant controversy the analysis and interpretation of an interstate compact which together with its enabling legislation constitutes not only an Act of the Legislature of West Virginia but which is also an Act of the Congress of the United States and the other states signatory to the Ohio compact. We will not repeat the argument clearly set forth in petitioner's brief and in the supporting briefs filed by the Attorneys General of the interested States and on behalf of the United States. These arguments respecting the interstate compact phase of this case clearly establish a jurisdictional basis for review by this Court.

Kentucky v. Indiana, 281 U. S. 163, 176-177

Stearns v. Minnesota, 179 U. S. 223

Virginia v. West Virginia, 220 U. S. 1

Delaware River Joint Toll Bridge Commission v. Colburn, 310 U. S. 419

Hinderlider v. LaPlata River and Cherry Creek Ditch Co., 304 U. S. 92.

The Issues to be Discussed

I. APPROPRIATIONS IN PERPETUITY.

Does membership in the Ohio Commission compact bind future West Virginia legislatures?

II. POLICE POWER.

Does membership in the Ohio Commission compact constitute a delegation or surrender of West Virginia's police power to the Ohio Commission?

III. CONSTITUTIONALITY.

Should a determination of unconstitutionality have been made on a hypothetical situation?

I.

APPROPRIATIONS IN PERPETUITY

Does membership in the Ohio Commission compact bind future West Virginia legislatures?

We would like to emphasize and refer to the pertinent provision of the Constitution of the State of West Virginia.

"Limitation on Contracting of State Debt.
 (Article X) 4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

It is upon this provision that respondent relies. We believe it can clearly be demonstrated that there is no conflict between this constitutional provision and the provisions of the Ohio compact. Reference to the specific safeguards of the Ohio compact illustrates that the framers of the compact

were aware of the necessity for recognizing the implications of this provision.

Article V of the Ohio compact reads as follows:

"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." (Emphasis supplied.)

Article VII of the compact specifically reserves to the states signatory all power and authority possessed by them prior to the enactment of the legislation authorizing the compact. The applicable phrase of this section is as follows:

"Nothing in this Compact shall be construed to limit the powers of any signatory state"

Article X of the compact is the section alleged to be in conflict with the Constitution of West Virginia. In pertinent part, it reads as follows:

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion of their population within the District at the last preceding federal census, the other half to be prorated to their land area within the District."

The enabling act of the State of West Virginia (see page 45, Petitioner's brief, Appendix C) employed the following language with respect to the appropriation of its portion of the necessary funds to support the Commission:

"There shall be appropriated to the Commission out of any moneys in the State treasury unex-

pended and *available therefor*, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportions of the State of West Virginia of the annual budget of the Ohio River Valley Water Sanitation Commission *in accordance with article ten of said compact.*

The commission shall elect from its membership a chairman and may also select a secretary who need not be a member. The commission may employ such assistance as it *may* deem necessarily required, and the duties of such assistants shall be prescribed and their compensation fixed by the commission and paid out of the state treasury out of funds appropriated for such purposes upon the requisition of said commission."

The above provisions make the intent of the signatory states, including West Virginia, with respect to the obligation of each state, abundantly and patently clear. Article X of the compact is necessarily limited by the prior provisions of Article V. The Commission may incur no obligation of any kind prior to the making of appropriations adequate to meet the same. The Commission must of practical necessity depend upon the appropriations of the signatory states for its existence. If it may not incur any obligation prior to the passage of adequate appropriations to meet them, it must await the endorsement of each successive legislature before proceeding beyond the limits of the last.

When these provisions are read together, it is clear that there is no conflict between the compact, the West Virginia enabling legislation, and Article X of West Virginia's Constitution. Article V and Article VII of the compact clearly prevent the Ohio Commission from in any way either pledging a credit of West Virginia or creating any debt for which West Virginia would be obligated prior to the time the Legislature of West Virginia appropriates funds for the obligation in question.

II

POLICE POWER

Does membership in the Ohio Commission compact constitute a delegation or surrender of West Virginia's police power to the Ohio Commission?

The second objection of the court below to the compact in question was that it delegated police power of the state to the Ohio Commission. Here again reference to the specific revisions of the compact demonstrates clearly the fallacy of this conclusion. Article IX of the compact in pertinent part reads as follows:

" * * * The Commission shall give reasonable notice of the time and place of the hearing to the municipality, corporation or other entity against which such order is proposed. *No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.*" (Emphasis supplied.)

West Virginia is represented on the Ohio Commission by its State Health Officer, Dr. Dyer, and two other commissioners who are appointees of the Governor of the State. With respect to any proposed order of the Ohio Commission for the abatement of any pollution condition within the territorial jurisdiction of West Virginia, these three West Virginia officials have complete jurisdiction and control. How this article could be considered a delegation of West Virginia's authority to act is certainly not shown by the majority opinion of the court below. As in the case of the sections of the compact relating to appropriation, it is believed that the compact itself when fairly analyzed and interpreted contains adequate safeguards to protect the

authority and sovereignty of each of the states signatory to the compact.

III

CONSTITUTIONALITY

Should a determination of unconstitutionality have been made on a hypothetical situation?

The specific situation with which the Court is confronted is the refusal of respondent, the State Auditor, to pay state funds previously appropriated by the Legislature of West Virginia to Dr. Dyer, the State Health Officer, for the use of the Ohio Commission. We think it is important to note that the action of the respondent must be regarded as contrary to the advice of the Attorney General of West Virginia who appeared in the court below as counsel for Dr. Dyer and the other West Virginia members of the Ohio Commission. It is also important to observe that the Attorney General of West Virginia appears in this Court as counsel for the petitioner. The duties of the State Auditor, under the circumstances, are clearly ministerial and not discretionary.

Under the circumstances, it is unnecessary to determine what the situation would be if the Legislature of West Virginia failed or refused to appropriate West Virginia's share of the expenses under the compact. That question is purely hypothetical and is neither before the court below nor is it properly an issue before this Court.

The majority of the court below determined that a binding obligation on future state legislatures was created by reason of the fact that a suit might be brought against the State of West Virginia if the Legislature of that State refused to appropriate funds or sought to withdraw from the compact. It was on this hypothetical situation that the unconstitutionality of the compact and the state enabling legislation was determined. It is clearly established by the decisions of this Court that constitutionality of legislation

should not be determined abstractly or in a hypothetical case. This Court applies the familiar canon of interpretation that where two interpretations of a statute are possible—one which saves and the other which destroys, the interpretation which saves the constitutionality will be adopted. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355, 57 S. Ct. 816, 824.

In the final analysis, we believe that the decision below was erroneous in that it was unnecessary for the court below to pass on the constitutionality of the compact. Its decision in so doing was based on a hypothetical set of facts not presented in this record. Its decision went far beyond its prerogatives in passing on the constitutionality of an interstate compact. This Court is the final arbiter of the validity or invalidity of interstate compacts. *Kentucky v. Indiana*, *supra*.

CONCLUSION

It is respectfully submitted that this Court should assume jurisdiction, and, after analyzing and weighing the provisions of this interstate compact, reverse the erroneous decision of the court below and thus remove the cloud created by the decision below on all interstate compacts.

Respectfully submitted,

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